Ban Hin Lee Bank Bhd v Pang Lai Hin

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO S2-24-554 OF 1998
KAMALANATHAN RATNAM J
14 JANUARY 1999

Civil Procedure *— Affidavits — Affidavit in support of application — Affidavit in support of originating summons affirmed before originating summons was filed — Whether affidavit valid*

Land Law *— Sale of land — Order for — Application for order — Date on which interest rate charged was to be effective stated in notice of demand differed from date in Form 16D — Plaintiff failed to show proof of its entitlement to charge interest as stipulated in demands — Whether there exists 'cause to the contrary'*

The plaintiff granted the defendant a housing loan facility whereby a first party legal charge was created by the defendant as a security. When the defendant defaulted on her instalment payments, the plaintiff issued a notice of demand to recall the housing loan. As the defendant failed to remedy the breach, a notice in Form 16D was served on her. A subsequent failure to remedy the breach led the plaintiff into filing an originating summons for an order of sale. The defendant, in her defence, submitted that the date on which the interest rate charged was to be effective, as stated in the notice of demand and Form 16D, differs from the date, stating the same, in the originating summons, thereby rendering the demands erroneous. The plaintiff attributed this as a typographical and clerical mistake. The plaintiff, then, relied on cl 50 of the annexure to the charge, stating an agreement between the parties that the defendant was to treat the certificate of indebtedness by the manager or an authorized officer of the bank as final and conclusive. The defendant also raised the issues of whether the plaintiff can actually charge the interest rate as stipulated in the demands and the admisibility of the plaintiff's affidavit in support of the originating summons, which was affirmed on 22 June 1998, whereas the originating summons was only filed on 24 June 1998.

Held, dismissing the application:

(1) There was no affidavit, either by the plaintiff or its solicitors, attributing the error to a typing or clerical error. Even if there was such an affidavit, the question is whether any rectification could be made in Form 16D. The allegation that there was a typographical and clerical mistake was only made in submission and was unsupported. The court found that the defendant has succeeded in showing 'cause to the contrary' (see p 238G).

(2) The certificate of indebtedness does not provide the plaintiff a blanket coverage. Since a manifest error in both the notice of demand and in Form 16D has been shown, the challenge to the

effectiveness of the conclusive evidence clause has been well and truly taken (see p 239E); *Cheng Heng Ping & Ors v Intradagang Merchant Bankers (M) Bhd* [1995] 2 MLJ 363 followed.

(3) The plaintiff has failed to show proof that it is entitled to charge interest of 2.3% pa above its BLR of 12.25% pa. Although the plaintiff exhibited its letter of offer, this alone is not sufficient since the charge specifically refers to the facilities agreement and not the letter of offer. The court held that the defendant has succeeded in showing 'cause to the contrary' (see p 239H–I).

(4) Where the affidavit forms the evidence on which the application is to be launched, and if the affidavit has not been affirmed in an existing cause or matter, the filing of such an affidavit cannot be treated as an irregularity that can be cured. It is a nullity as it supports a non-existent cause or matter. In this case, the affidavit affirmed on 22 June 1998 was a nullity (see p 240F–G); *Arab Malaysian Finance v Serajudin bin Mohd Ismail & Anor* [1999] 1 AMR 118 followed.

[Bahasa Malaysia summary

Plaintif telah memberi defendan pinjaman perumahan di mana gadaian pihak pertama telah diwujudkan oleh defendan sebagai cagaran. Apabila defendan ingkar dalam bayaran ansurannya, plaintif telah mengeluarkan notis tuntutan untuk menarik balik pinjaman perumahan tersebut. Oleh kerana defendan telah gagal untuk memperbaiki kemungkiran tersebut, notis Borang 16D telah diserahkan kepadanya. Kegagalannya yang terkemudian untuk memperbaiki kemungkiran tersebut telah menyebabkan plaintif memfailkan saman pemula untuk perintah jualan. Defendan dalam pembelaannya, menghujahkan bahawa tarikh berkuatkuasanya kadar faedah yang dikenakan, sepertimana yang terkandung dalam notis tuntutan dan Borang 16D, berbeza dari tarikh yang dinyatakan dalam saman pemula, maka itu menyebabkan tuntutan-tuntutan tersebut salah. Plaintif telah menjelaskan kesalahan tersebut sebagai kesilapan menaip dan perkeranian. Plaintif kemudian bergantung kepada fasal 50 lampiran gadaian, yang menyatakan persetujuan di antara kedua pihak bahawa defendan sepatutnya menganggap sijil keberhutangan dari pengurus bank ataupun pegawai yang diberi kuasa oleh bank sebagai muktamad dan tidak boleh dipertikaikan. Defendan juga membangkitkan isu sama ada plaintif sebenarnya boleh mengenakan kadar faedah sepertimana yang terkandung dalam tuntutan-tuntutan dan kebolehterimaan afidavit sokongan saman pemula plaintif, yang diikrarkan pada 22 Jun 1998, manakala saman pemula telah difailkan pada 24 Jun 1998.

Diputuskan, menolak permohonan:

(1) Tiada afidavit sama ada dari plantif ataupun peguamcara mereka, yang menerangkan bahawa kesilapan berpunca dari kesilapan

menaip menaip atau perkeranian. Biarpun terdapat afidavit sedemikian, persoalannya adalah sama ada pembetulan boleh dibuat pada Borang 16D. Dakwaan bahawa terdapat kesilapan menaip dan perkeranian hanya telah dibuat dalam penghujahan dan tanpa sokongan. Mahkamah mendapati bahawa defendan telah berjaya menunjukkan sebab sebaliknya (cause to the contrary) (lihat ms 238G).

(2) Sijil keberhutangan tidak memberi plaintif perlindungan sepenuhnya. Oleh kerana kesalahan nyata di kedua-dua notis tuntutan dan Borang 16D telah ditunjukkan, cabaran terhadap klausa keterangan muktamad telah ditimbulkan dengan baik (lihat ms 239E); *Cheng Heng Ping & Ors v Intradagang Merchant Bankers (M) Bhd* [1995] 2 MLJ 363 diikut.

(3) Plaintif telah gagal untuk menunjukkan bukti bahawa mereka mempunyai hak untuk mengenakan faedah sebanyak 2.3% setahun di atas kadar faedah asas sebanyak 12.25% setahun. Walaupun plaintif mengeksibitkan surat tawarannya, itu sahaja tidak mencukupi kerana gadaian khususnya merujuk kepada perjanjian pinjaman dan bukan kepada surat tawaran. Mahkamah memutuskan hahawa defendan telah berjaya menunjukkan sebab sebaliknya (lihat ms 239H–I).

(4) Di mana afidavit merupakan keterangan yang menjadi dasar permohonan dimulakan, dan jika afidavit belum diikrarkan dalam sesuatu tindakan yang telah wujud, pemfailan afidavit sedemikian tidak boleh disifatkan sebagai suatu yang di luar aturan yang tidak boleh diperbetulkan. Ia adalah suatu pembatalan kerana ia menyokong sesuatu tindakan yang tidak wujud. Di dalam kes ini, afidavit yang diikrarkan pada 22 Jun 1998 adalah satu pembatalan (lihat ms 240F–G); *Arab Malaysian Finance v Serajudin bin Mohd Ismail & Anor* [1999] 1 AMR 118 diikut.

Notes

For a case on affidavit in support of application, see 2(1) *Mallal's Digest* (4th Ed, 1995 Reissue) para 224.

For cases on order for sale of land, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 2605–2670.

Cases referred to

Arab Malaysian Finance v Serajudin bin Mohd Ismail & Anor [1999] 1 AMR 118 (folld)

Cheng Heng Ping & Ors v Intradagang Merchant Bankers (M) Bhd [1995] 2 MLJ 363 (folld)

Credit Corp (M) Bhd v Lucky Heights Development Sdn Bhd & Ors [1996] 4 MLJ 556 (refd)

Kheng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd & Ors [1983] 2 MLJ 384 (refd)

Lien Chong Credit & Leasing Sdn Bhd v Sri Saga Holdings Sdn Bhd & Ors [1997] 1 MLJ 367 (refd)

Legislation referred to

National Land Code 1965 ss 253(1), 256(3)

KL Teh (Ng Yook Woon, Andrew TC Saw & Co) for the plaintiff.
Eugene Lee (CY Yap & Lee) for the defendant.

Cur Adv Vult

Kamalanathan Ratnam J:

Facts

The plaintiff had agreed to grant a housing loan facility of RM80,000 to the defendant. A letter of offer, dated 27 May 1995, was duly signed by the defendant on 1 August 1995. As security, the defendant created a first party legal charge, dated 15 January 1996, on the whole of the land held under PN No 653 (HS (D) 20461) No Lot 37813, Mukim Kuala Lumpur, Daerah Kuala Lumpur, Negeri Wilayah Persekutuan ('the land'). The memorandum of charge was duly registered with the Registrar of Titles on 2 February 1996.

The defendant defaulted in her instalment payments entitling the plaintiff to recall the housing loan facility and to demand for the whole of the outstanding sum due together with interest.

The plaintiff issued a notice of demand, dated 8 May 1998, to the defendant to recall the housing loan facility. As the defendant failed to remedy the breach, a statutory notice in Form 16D was issued on 20 May 1998, and served on the defendant on 27 May 1998, by leaving the said notice together with a covering letter, dated 20 May 1998, in a sealed envelope in the post box at the last known address of the defendant. As the defendant had again failed to remedy the breach, the plaintiff proceeded by way of this originating summons for an order for sale.

Could the plaintiff apply for an order for sale?

There is no doubt that pursuant to s 256(3) of the National Land Code 1965 ('the NLC'), the court 'shall order the sale of the land or lease to which the charge relates unless it is satisfied of the existence of cause to the contrary'. In *Kheng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd & Ors* [1983] 2 MLJ 384, the Federal Court said (at p 388):

> It is clear that notwithstanding the proof of default by a chargor, the chargee is not automatically entitled to an order to sale nor would the court, without scrutiny, allow his application. The court must decide whether there are circumstances in the case before it which would amount to a 'cause to the contrary' within the meaning of sub-s (3) which would be sufficient, in its opinion, to refuse the chargee's application although the charge is lawfully and validly created and the chargor's default is proved.

No doubt there was default on the part of the chargor in this case which entitled the plaintiff to act upon the charge to apply for foreclosure of the property. It therefore behoves the defendant to indicate if there is any 'cause to the contrary'.

Invalid notice of demand

The plaintiff's notice of demand (exh 'B' to the affidavit in support of the application), dated 8 May 1998, states that the interest charged was at the rate of 2.35% pa above the plaintiff's base lending rate ('the BLR') of 12.25% pa, effective from 7 May 1998. Further, exh D (also annexed to the same affidavit), which is the Form 16D, also refers to the effective date as 7 May 1998. However, the originating summons (encl 1) refers to the effective date as being 6 May 1998.

It was the argument of the defendant that assuming the correctness of exhs B and D, it would mean, therefore, that the plaintiff was claiming a sum it was not entitled in law, under the present application. Alternatively, the defendant argued that since the demands by the plaintiff were erroneous, she was entitled to ignore the said demands.

In response, the plaintiff argued that in her reply affidavit, the defendant had merely stated that the demands and interest were incorrect without descending to any particulars. In support, the plaintiff relied on the Court of Appeal decision in *Lien Chong Credit & Leasing Sdn Bhd v Sri Saga Holdings Sdn Bhd & Ors* [1997] 1 MLJ 367. In that case, the defence was a mere denial of the allegations contained in the statement of claim and in allowing the plaintiff's appeal, the Court of Appeal held that the trial judge had incorrectly held that the interest payable was excessive, even though there was no affidavit to that effect, and therefore, the appellate court granted summary judgment. In my view, this case does not assist the plaintiff. Whilst the defendant had admittedly not referred specifically to the errors in the originating summons, and in both the demands in respect of the effective date of the implementation of the interest, the very documents the plaintiff is relying on show the discrepancy. In fact, in its submission, the plaintiff admits that the effective date was 6 May 1998, and not 7 May 1998, as stated in the notice of demand and in the statutory notice of demand, that is, Form 16D. The plaintiff attributes this as a typographical and clerical mistake.

I have to reject this plea. Firstly, there was no affidavit either by the plaintiff or its solicitors attributing the error to a typing or clerical mistake. Secondly, even if there was such an affidavit, the question is whether any rectification could be made in the Form 16D. For the moment and in respect of this case, the allegation that there was a typographical and clerical mistake is only made in submission and is unsupported.

On this issue alone, I find that the defendant has succeeded in showing 'cause to the contrary'.

Conclusive evidence clause

The plaintiff relied on cl 50 of the annexure to the charge which is the conclusive evidence clause, wherein the parties agreed that a certificate of indebtedness by the manager or an authorized officer of the bank shall be accepted by the defendant as final and conclusive 'for all purposes whatsoever including for purposes of legal proceedings and shall not be

A questioned on any account whatsoever'. In respect of such a clause, I had said in *Credit Corp (M) Bhd v Lucky Heights Development Sdn Bhd & Ors* [1996] 4 MLJ 556 at p 564:

> ... no claimant should be allowed to hide behind a conclusive evidence clause and be allowed to make unlawful demands against its borrowers or guarantors.
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> B ... I hold that the presence of a conclusive evidence clause per se, cannot prevent the guarantors from questioning the correctness or otherwise of the account sought to be produced as conclusive evidence against them ... .

The Court of Appeal in *Cheng Heng Ping & Ors v Intradagang Merchant Bankers (M) Bhd* [1995] 2 MLJ 363, expressed its binding view on the effectiveness of the conclusive evidence clause through the judgment of C Mahadev Shankar JCA as follows (at p 369):

> ... even though the guarantors are contractually precluded from requiring the bank to prove the accuracy of the certificate, it does not prevent the guarantors from adducing evidence to show that there is a manifest error on the face of the certificate or fraud. The initial onus is on the guarantors. The *court* is not D bound by the contractual provision in the guarantee. When evidence is produced which casts doubts on the accuracy of the certificate, it should not accept the certificate as conclusive.

In the circumstances, it is my judgment that the statement of account or the certificate of indebtedness does not provide the plaintiff a blanket coverage. Since, as in this case, a manifest error, in both the notice of demand and in E Form 16D, has been shown, the challenge to the effectiveness of the conclusive evidence clause has been well and truly taken.

Can the plaintiff actually charge the interest?

It is patently clear that the plaintiff's right to proceed with the order for sale F arises from its statutory right as provided in s 253(1) of the NLC, and the plaintiff's exercise of its statutory right stems from the charge and its annexure. A study of both the charge and the annexure shows that there is no provision for the imposition of any interest nor does it state the amount of interest chargeable.

G However, cl 1(a) of the annexure refers to a facilities agreement made between the plaintiff and the defendant chargor, whereby the plaintiff agreed to grant banking facilities of up to an aggregate principal sum of RM80,000, as stated in item 4 of the First Schedule, upon the terms and subject to the conditions therein contained. Clause 4 of the facilities agreement stipulates 'that the facilities agreement shall be deemed to be H incorporated into and form part of the charge ...'.

The plaintiff has, however, not exhibited the said facilities agreement. It is my judgment, therefore, that in the absence of all this important facilities agreement as evidenced, the plaintiff has failed to show proof that it is entitled to charge interest at 2.35% pa, above its BLR of 12.25% pa.

I Although the plaintiff has exhibited its letter of offer dated 27 July 1995, it is my judgment that this alone is not sufficient since the charge annexure specifically refers to the facilities agreement and not to the letter of offer. On this ground too, I hold that the defendant has succeeded in showing 'cause to the contrary'.

Admissibility of encl 2

The defendant took issue with the fact that the affidavit in support of the plaintiff's originating summons (encl 2) was affirmed on 22 June 1998, whereas the originating summons was filed on 24 June 1998. In *Arab Malaysian Finance Bhd v Serajudin bin Mohd Ismail & Anor* [1999] 1 AMR 118, I had said, in respect of affirming an affidavit before filing an originating summons, as follows (at p 120):

> With respect, I am of the view that specific attention ought to be given to O 41 r 1 of the RHC which reads:
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> '(1) Subject to paragraphs (2) and (3), every affidavit sworn in a cause or matter must be entitled in that cause or matter.
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> (2) Where a cause or matter is entitled in more than one matter, it shall be sufficient to state the first matter followed by the words 'and other matters', and where a cause or matter is entitled in a matter or matters and between parties, that part of the title which consists of the matter or matters may be omitted.
>
> (3) ...'
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> In other words, an affidavit affirmed in a cause or matter must be intituled in that cause or matter. For a cause or matter to be properly entitled or intituled, the case number relating to that cause or matter is a vital factor that must be present; and before a case number is given to that particular cause or matter, it must comply with O 1 r 4 of the RHC, which defines a 'cause book' as a book kept in the Registry in which the number of, and other details relating to, a cause or matter are entered. Therefore, where, as in this case, an affidavit has been affirmed exactly one week before the OS was filed, surely the said affidavit cannot be said to have been affirmed in a cause or matter because, properly speaking, there was no cause or matter that had been registered at the Registry. Whilst I agree that in so far as interlocutory or ex parte applications are concerned, the courts have accepted the affidavit affirmed, prior to the filing of the application, on the express undertaking of counsel to reswear the said affidavit, but in the present case, where the affidavit forms the evidence on which the application is to be launched, and if the affidavit has not been affirmed in an existing cause or matter, then the filing of such an affidavit cannot be treated as an irregularity that can be cured. In my view, it is a nullity as it supports a non-existent cause or matter. In other words, the affidavit is 'still-born' and no resuscitative procedure by way of O 2 r 1 of the RHC, which relates to the liberal stand taken by the courts in respect of non-compliance of the rules, can breathe life into the 'still-born'. It remains a nullity. In the circumstances, even O 41 r 4 of the RHC, which read:
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> > 'An affidavit may, with the leave of the court, be filed or used in evidence notwithstanding any irregularity in the form thereof.'
>
> cannot save the day for the plaintiff.

Even on this issue, the defendant will succeed.

I therefore have no hesitation in dismissing this application with costs.

Application dismissed.

Reported by Mohd Rizal Abidin